

Genie Harrison, SBN 163641
Amber Phillips, SBN 280107
Mary Olszewska, SBN 268710
GENIE HARRISON LAW FIRM, APC
523 W. 6th Street, Suite 707
Los Angeles, CA 90014
T: (213) 805-5301 F: (213) 805-5306
genie@genieharrisonlaw.com
amber@genieharrisonlaw.com
mary@genieharrisonlaw.com

Attorneys for PLAINTIFF

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JOHN DOE, an individual,
Plaintiff,

vs.

KEVIN SPACEY FOWLER, an
individual, M. PROFITT
PRODUCTIONS, INC., a California
Corporation, and DOES 1-9, inclusive.
Defendants.

**Case No.: 2:19-CV-00750-RSWL
(SSx)**

**PLAINTIFF'S OPPOSITION TO
DEFENDANT FOWLER'S *EX*
PARTE APPLICATION FOR AN
ORDER TO SET DEADLINES
UNDER RULE 26; DECLARATION
OF MARY OLSZEWSKA**

Complaint Filed: September 27, 2018

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2 **TO THE COURT, ALL INTERESTED PARTIES AND TO THEIR**
3 **COUNSEL OF RECORD:**

4 **PLAINTIFF JOHN DOE HEREBY OPPOSES** *Defendant Fowler’s Ex Parte*
5 *Application for An Order to Set Deadlines Under Rule 26 (“Ex Parte Application”).*

6 **I. INTRODUCTION**

7 Plaintiff John Doe (“DOE”) opposes Defendant’s *Ex Parte Application* because:
8 (i) Defendant failed to meet and confer as required by Central District Local Rule 7-3
9 when it abandoned the meet and confer process mid-stream; (ii) Plaintiff has a legitimate
10 concern that participation in a Rule 26 conference can be deemed a waiver of rights to
11 seek remand, *see Smith v. Mylan, Inc.* (9th Cir. 2014) 761 F.3d 1042, 1046 (participation
12 in a Rule 26 conference may implicitly waive grounds for remand), (iii) the parties would
13 be prejudiced by spending considerable time, effort and resources drafting a federal
14 discovery plan which may be invalidated by remand, (iv) scheduling disputes do not rise to
15 level of emergency *ex parte* relief; and, (v) instead of completing a productive meet and
16 confer effort, Defendant’s *Ex Parte Application* was hastily filed in an attempt to
17 circumvent having this Court rule on Plaintiff’s Motion for Leave to Proceed
18 Anonymously and to obtain the premature release of DOE’s identity.

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20 **II. PROCEDURAL AND FACTUAL HISTORY**

21 DOE originally filed this case in the Los Angeles Superior Court for state law
22 claims related to sexualized violence perpetrated by Defendant Kevin Spacey Fowler
23 (“Spacey”). [PACER Docket Number/Entry “D.E.” 1]. Defendant Spacey removed the
24 case to federal court [D.E.1] and moved to dismiss Plaintiff’s claims [D.E. 8]. Plaintiff
25 subsequently filed the following pleadings and motions:

- 26 (i) a First Amended Complaint dismissing his false imprisonment claim and
27 adding Defendant M. Proffitt Productions, Inc., Defendant Spacey’s “loan-
28 out” company and a non-diverse defendant [D.E. 14],

- 1 (ii) Plaintiff's Motion for Leave to Proceed Anonymously seeking leave to
2 proceed through a pseudonym to protect Plaintiff from financial, physical,
3 and emotional injury, harassment, ridicule, and personal embarrassment
4 [D.E. 19]; and
5 (iii) Plaintiff's Motion for Joinder and Remand to State Court [D.E. 21].

6 The parties agreed and stipulated [D.E. 29] to have the pending motions heard on April
7 16, 2019.

8 Last week, the parties sent emails meeting and conferring about the Rule 26
9 conference, each taking different positions about its propriety. Defendant stated that the
10 meeting of counsel needed to proceed on Monday, March 11th, and Plaintiff stated that it
11 should be scheduled after this Court's ruling on Plaintiff's motion seeking remand and
12 attempted to schedule a call for March 12th or 13th. *Declaration of Mary Olszewska*
13 (*"Olszewska Decl."*) ¶2.

14 On Thursday, March 15, 2019, Defense Counsel – Mr. Jay Barron -- called
15 Plaintiff's Counsel – Ms. Mary Olszewska -- at 3:26 PM to discuss the pending *Ex Parte*
16 *Application*. This was the first time, whether telephonically or in writing, that defense
17 counsel raised the issue of bringing this *Ex Parte Application*. *Olszewska Decl.* ¶3. All
18 prior calls between Ms. Olszewska and Mr. Barron have been civil, friendly, and
19 productive, and the calls of March 14, 2019, were no different. *Olszewska Decl.* ¶3.

20 Mr. Barron explained the relief to be sought through the *Ex Parte Application*. Ms.
21 Olszewska asked Mr. Barron to allow her a few minutes to obtain all the available
22 information about the issue in order to have a substantive discussion via a return call in
23 short order. Mr. Barron agreed and Ms. Olszewska returned his call at 3:46 PM.
24 *Olszewska Decl.* ¶4.

25 During that second call (which lasted for approximately 12 minutes), Ms.
26 Olszewska communicated Plaintiff's legitimate concern about waiver of grounds for
27 remand and cited to *Smith v. Mylan, Inc.* (9th Cir. 2014) 761 F.3d 1042, 1046
28 (participation in a Rule 26 conference may implicitly waive grounds for remand).

1 *Olszewska Decl.* ¶5. Ms. Olszewska suggested continuing to meet and confer that day
2 towards a stipulation to prevent the *Ex Parte Application*. In response, Mr. Barron
3 proposed stipulated terms – the same terms which would be sought in the *Ex Parte*
4 *Application. Id.* To prevent motion practice, and to set a tone of cooperation, Ms.
5 Olszewska advised that she would consult with Ms. Genie Harrison at the end of the
6 phone call and respond to Defendant’s proposed terms with a counter proposal before the
7 day’s end. *Id.* The call ended at 3:58 PM with an understanding that, *prior to filing the*
8 *Ex Parte Application*, Defendant would entertain a good faith meet and confer proposal
9 from Plaintiff. *Id.*

10 Mr. Barron’s statement in his Declaration that during the parties’ call “Ms.
11 Olszewska suggested ... Plaintiff would agree to at least some of the requested relief
12 after seeing the Application” is factually incorrect. *Declaration of Jay P. Barron in*
13 *Support of Defendant Fowler’s Ex Parte Application (“Barron Decl.”)* ¶8. *Olszewska*
14 *Decl.* ¶6. Instead, Ms. Olszewska said that the proposed terms communicated by
15 Defendant during the call would be considered and a counter proposal would be provided
16 before the day’s end *prior to* the filing of any *ex parte application. Id.* The purpose of a
17 counter proposal was to prevent the need for an *ex parte application. Id.*

18 While Plaintiff followed through and emailed a counter proposal just 45 minutes
19 later at 4:43 PM, Defendant nonetheless reneged on and abandoned efforts to resolve the
20 issue between the parties and filed the *Ex Parte Application. Olszewska Decl.* ¶7, *Exhibit*
21 *A; see also Ex Parte Application.* In an effort to resolve the matter without the Court’s
22 intervention, Plaintiff’s email agreed to request Defendant’s request to set a scheduling
23 conference on or after April 16, 2019 and agreed to a Rule 26 discovery conference. *Id.*

24 Ms. Olszewska’s substantive, dispute resolution-oriented email was sent only 1
25 hour and 17 minutes after Defendant first raised the issue of bringing this *Ex Parte*
26 *Application. Olszewska Decl.* ¶¶7-8, *Exhibit A.* Additionally, Plaintiff’s meet and confer
27 response was sent at exactly the same time as Defendant filed its *Ex Parte Application*
28 (4:43 PM) per the ECF email received by Plaintiff’s counsel. *Olszewska Decl.* ¶8.

1 Defendant's counsel waited to meet and confer about its *Ex Parte Application* until
2 the 3:26 PM phone call, in response to which Plaintiff's counsel said we would provide a
3 substantive response in an effort to resolve the matter informally before the close of
4 business, and yet Defendant refused to wait to complete the meet and confer process and
5 simply filed its *Ex Parte Application* and did so at the same time that Plaintiff responded
6 *conciliatorily* trying to find resolution. *Olszewska Decl.* ¶¶7-8, *Exhibit A*.

7 Defense counsel abandoned the meet and confer process after only 1 hour and 17
8 minutes' worth of effort while Plaintiff's counsel was researching the issues and drafting
9 a resolution-oriented email, in order to file the *Ex Parte Application*. Defense counsel's
10 actions show that Defendant was not interested in actually trying to resolve the issue and
11 demonstrate that there was no good faith effort to meet and confer. *Olszewska Decl.* ¶¶7-
12 8, *Exhibit A*.

13 14 **III. THE EX PARTE APPLICATION SHOULD BE DENIED**

15 **A. Defendant Failed Meet and Confer in Good Faith Per Rule 7-3**

16 Central District Rule 7-3 requires that before any motion may be filed, the moving
17 party must fully meet and confer in a good faith effort to resolve the dispute. Here,
18 Defendant only gave 1 hour and 17 minutes' worth of effort at meeting and conferring
19 after raising the issue of bringing the *Ex Parte Application*. *Olszewska Decl.* ¶¶3-8.
20 Despite counsel for Plaintiff having two phone calls with counsel for defense during that
21 1 hour and 17 minutes, and promising to provide a written substantive response in an
22 effort to resolve the matter before the end of that day, Defendant filed the *Ex Parte*
23 *Application* without completing the meet and confer process. And, at the exact same time
24 that Defendant filed this application, Plaintiff's counsel responded via email with a good
25 faith effort to resolve the matter. *Olszewska Decl.* ¶7; *Exhibit A*.

26 Plaintiff's effort to resolve the Rule 26 conference timing included a proposal to
27 stipulate to schedule the conference after the Court rules on Plaintiff's pending Motion to
28 Remand. *Olszewska Decl.* ¶7; *Exhibit A*. In a further effort to resolve the matter without

1 the Court's intervention, Plaintiff also agreed to have the Rule 26 conference scheduled
2 for the same date as the upcoming hearing on the Motion to Remand. *Olszewska Decl.*
3 ¶7; *Exhibit A*. However, Defendant refused even to wait to receive that offer and filed his
4 *Ex Parte Application* while the meet and confer process was ongoing and only 1 hour and
5 17 minutes after first raising the issue of bringing the *Ex Parte Application*. *Olszewska*
6 *Decl.* ¶¶7-8; *Exhibit A*.

7 Defendant has not engaged a good faith meet and confer process and the Court
8 should deny this *Ex Parte Application* as a result.

9 **B. The *Ex Parte Application* Is a Transparent Effort to Get Plaintiff's**
10 **Name Before the Hearing on Plaintiff's Motion to Proceed**
11 **Anonymously and Before Defendant Asserts His 5th Amendment**
12 **Rights**

13 What has been clarified over the past twenty-four hours is that Defendant seeks to
14 turn a purported disagreement about the Rule 26 conference into a bludgeon to force
15 premature disclosure of Plaintiff DOE's identity. What Defendant seeks here is not to set
16 a Scheduling Conference or create a discovery plan, but to circumvent full briefing and
17 hearing on the Plaintiff's Motion for Leave to Proceed Anonymously [D.E. 19] and other
18 pending motions.

19 Seeking the revelation of a DOE Plaintiff's identity as relief in an *Ex Parte*
20 *Application* related to a Rule 26 conference is telling that something is amiss. It is
21 worrisome as to why Defendant cannot wait a month until the Court and the parties have
22 had a full opportunity for hearing on the merits, which gives Plaintiff pause about
23 Defendant's intent.

24 As explained in Plaintiff's Motion for Leave to Proceed Anonymously [D.E. 19],
25 Plaintiff – a victim of sexualized violence by Defendant -- sought leave to proceed
26 through a pseudonym to protect him from financial, physical, and emotional injury,
27 harassment, ridicule, and personal embarrassment, largely, because of the special
28 circumstance of involving a high-profile celebrity, and the corresponding certainty of
heightened media and tabloid attention. [D.E. 19, p. 5 of 9].

1 Defendant has not renounced his intent to stay discovery in this case pending the
2 disposition of sexual assault criminal proceedings against him in Nantucket District Court
3 [D.E. 19, p. 6 of 9]. Nor has Defendant agreed not to invoke his Fifth Amendment rights
4 [D.E. 19, p. 6:23-25 of 9] in response to discovery. Instead, Defendant wants to know
5 Plaintiff's identity and wants a ruling giving him that information before the Court has
6 the opportunity to review Plaintiff's motion to proceed anonymously. Given the harm to
7 Plaintiff in revealing his name, there is no good cause to reveal Plaintiff's identity.

8 It seems like Defendant Spacey is angry and wants to know Plaintiff's name now,
9 darn it; so, his counsel abandoned the meet and confer process to appease a high-profile,
10 demanding client and brought this *Ex Parte Application* seeking to reveal Plaintiff's
11 identity.

12 There is certainly no good cause to reveal Plaintiff's identity on an *ex parte* basis
13 under the guise of needing to schedule a Rule 26 conference before the hearing on
14 Plaintiff's Motion to Remand.

15 16 **IV. CONCLUSION**

17 Plaintiff respectfully requests that the Court deny the relief requested *Ex Parte*
18 *Application* and defer any scheduling conference and corresponding Rule 26 conference
19 until after hearing on Plaintiff's Motion for Joinder and Remand to State Court [D.E. 21]
20 to prevent prejudice to the parties in spending considerable time and effort drafting a
21 federal discovery plan which may be invalidated by remand.

22
23 **DATED: March 15, 2019**

Genie Harrison Law Firm, APC

24
25 By: Mary Olszewska
26 Genie Harrison, Esq.
27 Mary Olszewska, Esq.
28 Amber Phillips, Esq.
Attorneys for PLAINTIFF JOHN DOE

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I am a resident of the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 523 West 6th Street, Suite 707, Los Angeles, California 90014.

**PLAINTIFF’S OPPOSITION TO DEFENDANT FOWLER’S EX PARTE
APPLICATION FOR AN ORDER TO SET DEADLINES UNDER RULE 26**

I hereby certify that, on March 7, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

Genie@genieharrisonlaw.com
Mary@genieharrisonlaw.com
jkeller@kelleranderle.com
cscolnick@kelleranderle.com
jbarron@kelleranderle.com

/s/ Michelle Patino-Patroni
Michelle Patino-Patroni